Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of

Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services To VoIP Providers	)	WC Docket No. 06-55

OPPOSITION TO PETITION FOR DECLARATORY RULING

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On Behalf of

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TOWNES TELECOMMUNICATIONS, INC.
ITS TELECOMMUNICATIONS SYSTEMS, INC.
PUBLIC SERVICE TELEPHONE COMPANY
SMART CITY TELECOM
SOUTH SLOPE COOPERATIVE TELEPHONE CO., INC.
YADKIN VALLEY TELEPHONE MEMBERSHIP CORPORATION

Dated: April 10, 2006

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SUMMARY

No declaratory ruling is necessary on the narrow question presented in the Petition, namely whether telecommunications carriers are entitled to request interconnection pursuant to Section 251(a) of the Act, because the statute is clear. However, the rulings sought by TWC go far beyond this simple, straightforward question and, as demonstrated herein, should be denied.

The declaratory rulings requested by TWC would have the effect of prejudging issues before the Commission in the *IP-Enabled Services Proceeding* concerning the different types of categories of IP-enabled services and how those categories would affect whether the service is properly classified as a "telecommunications service. It appears that the arrangement between TWC and Sprint and MCI is an attempt to circumvent the fact that VoIP providers have not yet been classified as telecommunications carriers and secure for TWC the benefits of Section 251, even when it is not entitled to those benefits, and without any of the obligations. Further, it appears that it is an attempt to avoid LEC access charges.

With respect to TWC's larger point – that the uncertainty of VoIP's regulatory classification is completely divorced from wholesale carriers' interconnection rights – TWC mischaracterizes the nature of the arguments in the state arbitration proceedings. The state proceedings were not focused simply on whether a wholesale carrier has the right to interconnection pursuant to Section 251(a). Rather, the proceedings examined whether the wholesale carrier or the VoIP provider is entitled to the various rights and

responsibilities under Section 251(b), including compensation for the transport and termination of traffic. Because an interconnection agreement is a contract between parties, it is essential to correctly identify the real parties in interest. As a practical matter, incumbent LECs will be in an uncertain and unfair position if they are required, pursuant to interconnection agreements, to pay reciprocal compensation to an intermediary carrier, like Sprint and MCI, and the Commission ultimately determines that the VoIP provider is the telecommunications carriers entitled to reciprocal compensation

Further, because arbitration decisions are based on the specific facts and arguments presented to the state commission by the parties, it is doubtful that the rulings requested by TWC would be of value in future state commission proceedings in which the arguments and facts to be presented cannot be known. More likely, a Commission ruling would stifle state commission fact finding efforts to determine TWC's relationship with Sprint and MCI.

Finally, taken as a whole, it could be concluded that the purpose of TWC's Petition is to prevent incumbent LECs from raising, and state commissions from considering, lawful objections to requests for interconnection and the various obligations imposed by Section 251(b) of the Act. The Commission should deny TWC's attempt, through the declaratory ruling process, to prejudge factual questions and to preempt state commissions in connection with arbitration proceedings.

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OPPOSITION TO PETITION FOR DECLARATORY RULING

South Dakota Telecommunications Association[1] (SDTA), Townes Telecommunications, Inc. (Townes)[2], ITS Telecommunications Systems, Inc., Public Service Telephone Company, Smart City Telecom, South Slope Cooperative Telephone Co., Inc., and Yadkin Valley Telephone Membership Corporation (hereinafter jointly referred to as Rural Commenters), by their attorneys, hereby oppose the Petition for Declaratory Ruling (Petition) filed by Time Warner Cable (TWC) concerning interconnection under section 251 of the Communications Act of 1934, as amended. For the reasons discussed herein, Rural Commenters urge the Commission to either deny the Petition or consider the issues in the *IP-Enabled Services Proceeding.*[3]

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[1] SDTA is an association of 30 independent, cooperative and municipal incumbent local exchange carriers serving rural areas in South Dakota.
[2] Townes is comprised of seven rural incumbent local exchange carriers serving areas in Arkansas, Colorado, Florida, Kansas, Missouri and Texas.
[3] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (*IP-Enabled Services Proceeding*).

I. Summary of the Petition

In the Petition, TWC states that a number of state commissions have decided questions concerning the right of telecommunications carriers to request interconnection from an incumbent local exchange carrier (LEC) in the context of interconnection agreement arbitration proceedings in different ways. TWC states that it is a VoIP provider and, in most of its service areas, it has "arranged to purchase wholesale telecommunications services from Sprint Communications Company, L.P. (Sprint) or MCI WorldCom Network Services, Inc. (MCI), thereby permitting Time Warner Cable, where necessary, to receive calls from and deliver calls to subscribers connected to the PSTN."[4] Elsewhere in its Petition, TWC indicates that it is the "customer" of Sprint and MCI.[5] TWC states further that "Sprint and MCI also assist Time Warner Cable in providing E911-related connectivity; performing local number portability; administering, paying and collecting intercarrier compensation; transporting and terminating long-distance traffic; and providing operator services and directory assistance."[6] TWC indicates that Sprint and MCI are competitive telecommunications carriers that have requested interconnection pursuant to Section 251 of the Act with various rural LECs to obtain interconnection, reciprocal compensation and local number portability (LNP).

TWC alleges that in some states it "has been unable to purchase wholesale telecommunications services from Sprint or MCI because the state commissions have upheld rural LECs' arguments that they are not obligated to enter into interconnection agreements with competitive carriers to the extent that such competitors operate as

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[4] TWC Petition at 4.
[5] TWC Petition at 11.
[6] TWC Petition at 4.

wholesale carriers."[7] In support of this statement, TWC states that the South Carolina Commission and the Nebraska Commission found, in arbitration proceedings, that MCI and Sprint, respectively, were not "telecommunications carriers" entitled to interconnection pursuant to Section 251 of the Act in connection with their arrangement with TWC.

TWC argues that Commission action is necessary to stop state commissions from reaching "erroneous" decisions that impede competition. TWC states that the Commission "should promptly grant a declaratory ruling reaffirming that requesting telecommunications carriers are entitled to obtain interconnection with incumbent LECs to provide wholesale telecommunications services to other service providers" and requests that the Commission "clarify that interconnection rights under Section 251 of the Act are not based on the identity of the requesting carrier's customer."[8]

On the narrow question presented in the Petition, namely whether telecommunications carriers are entitled to request interconnection pursuant to Section 251(a) of the Act, no declaratory ruling is necessary because the statute is clear. However, the text of the Petition demonstrates that the rulings sought by TWC go far beyond this simple, straightforward question. Rather, TWC seeks rulings on its attempt to game the Section 251 interconnection rules. Further, as demonstrated herein, such rulings would prejudge the *IP-Enabled Service Proceeding* and future state proceedings and, therefore, should be denied.

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[7] TWC Petition at 4.
[8] TWC Petition at 11.

II. The Petition for Declaratory Ruling Would Prejudge the *IP-Enabled Services Proceeding*

Among the Rural Commenter's concerns with the Petition, the declaratory rulings requested by TWC would have the effect of prejudging issues before the Commission in the *IP-Enabled Services Proceeding*. In the *IP-Enabled Services Proceeding*, the Commission requested comment on the different types of categories of IP-enabled services and how those categories would affect whether the service is properly classified as a "telecommunications service" and the need to impose certain regulatory requirements on VoIP providers.[9] It appears that the arrangement between TWC and Sprint and MCI is a ruse—an attempt to circumvent the inconvenient regulatory reality that VoIP providers have not yet been classified as telecommunications carriers and secure for TWC the benefits of Section 251, even when it is not entitled to those benefits, and without any of the obligations. Further, it appears that it is an attempt to avoid LEC access charges.

Because VoIP providers have not been classified as telecommunications carriers, TWC, as a VoIP provider, is not subject to the duties or entitled to the rights contained therein that only are available to telecommunications carriers. For example, Section 251(a), which requires each telecommunications carrier to interconnect with the facilities and equipment of other telecommunications carriers, does not apply to VoIP providers at this time. Similarly, because the Commission's rules specify that LECs must make available long-term database number portability after a request from another "telecommunications carrier," it appears that VoIP providers have no right under Section

[9] *IP-Enabled Services Proceeding* at ¶6.

251(b)(2) of the Act and the Commission's implementing rules to request LNP from LECs.

With respect to reciprocal compensation pursuant to Section 251(b)(5), it must be noted that in the *IP-Enabled Services Proceeding*, Sprint is on record as stating that the VoIP service provider is responsible for paying compensation for the transport and termination of traffic from its customers. In that proceeding, Sprint argued that "a facilities-based VoIP provider, such as a cable system offering telephony, should be able to charge and be compensated for calls carried over its local facilities."[10] Similarly, in its reply comments, Sprint stated that "VoIP providers terminating calls on other networks must pay equitable compensation for the use of those facilities."[11] Sprint also called for the Commission to issue an immediate ruling that VoIP providers must pay access charges when using the facilities of another provider, whether the Commission classifies them as information service providers or telecommunications carriers.[12]

However, in the state proceedings referenced by TWC, Sprint argues that it is the telecommunications carrier entitled to reciprocal compensation in connection with VoIP service provided by a third-party, such as TWC. The position taken by Sprint in the states appears to be in conflict with its position before this Commission. The Commission should examine the Sprint/TWC arrangement and Sprint's apparently contradictory positions in the *IP-Enabled Services Proceeding*.

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[10] Comments of Sprint Corporation, WC Docket No. 04-36, dated May 28, 2004, at 26-27.

[11] Reply Comments of Sprint Corporation, WC Docket No. 04-36, dated July 14, 2004, at 2.

[12] *Id.* at 9. In this proceeding, Sprint also argued that "VoIP services that are offered and function as substitutes for TDM voice calls are telecommunications services" and that the Commission should define them as such. Comments of Sprint Corporation, WC Docket No. 04-36, dated May 28, 2004, at 7.

III. The Nature of the Arrangement with the VoIP Provider Does Affect Section 251 Rights and Obligations

In the Petition, TWC argues that the present uncertainty regarding the classification of VoIP as a telecommunications service or information service does not affect wholesale carriers' interconnection rights. According to TWC, "[t]he competitive carrier's status as a requesting 'telecommunications carrier' determines its entitlement to interconnection under Sections 251(a) and 251(c)(2), regardless of whether it sells transmission to another telecommunications carrier or to an information service provider."[13] Elsewhere in the Petition, TWC asks the Commission to declare that competitive LECs are entitled to interconnect with incumbent LECs for the purpose of exchanging traffic on behalf of VoIP providers.[14]

As an initial matter, the language used by TWC, "on behalf of," implies an agency arrangement between TWC on the one hand, and Sprint or MCI on the other.[15] To the extent Sprint and MCI are acting as agents in connection with their requests for interconnection pursuant to Section 251 of the Act, they would have none of the rights under this section that are available to telecommunications carriers, as TWC is not itself a telecommunications carrier. Accordingly, TWC's request for declaratory ruling that competitive LECs are entitled to interconnect with incumbent LECs for the purpose of exchanging traffic on behalf of VoIP providers should be denied.

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[13] TWC Petition at 19.
[14] TWC Petition at 12 and 23.
[15] Sprint and MCI, however, did not request interconnection to exchange traffic "on behalf of" TWC in the state commission proceedings referenced in the Petition. Rather, Sprint and MCI asked to interconnect and exchange traffic on their own behalf, with the payment of reciprocal compensation to themselves.

With respect to TWC's larger point – that the uncertainty of VoIP's regulatory classification is completely divorced from wholesale carriers' interconnection rights – TWC mischaracterizes the nature of the arguments in the state arbitration proceedings. The state proceedings were not focused simply on whether a wholesale carrier has the right to interconnection pursuant to Section 251(a). Rather, the proceedings examined whether the wholesale carrier or the VoIP provider is entitled to the various rights and responsibilities under Section 251(b), including compensation for the transport and termination of traffic. In the *IP-Enabled Services Proceeding*, Sprint correctly argued that the VoIP provider is the entity transporting and terminating traffic. Sprint and MCI, at most, are intermediary carriers, like transit carriers, and are not entitled to reciprocal compensation.

Further, it must be remembered that an interconnection agreement is a contract between parties and it is essential to correctly identify the real parties in interest. As a practical matter, incumbent LECs will be in an uncertain and unfair position if they are required, pursuant to interconnection agreements, to pay reciprocal compensation to an intermediary carrier, like Sprint and MCI, and the Commission ultimately determines that the VoIP provider is the telecommunications carriers entitled to reciprocal compensation.[16] In this case, incumbent LECs would be open to claims by VoIP providers that the LEC must pay compensation to the VoIP provider. And, since the VoIP provider is not a party to the interconnection agreement, the fact that the LEC is already paying compensation to another carrier may not be a defense.

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[16] Rural Commenters do not mean to indicate agreement that reciprocal compensation is due on all VoIP traffic, in light of the Commission's finding that VoIP traffic is jurisdictionally mixed.

IV. The Petition for Declaratory Ruling is not Necessary and May Impede Future State Commission Proceedings

In its Petition, TWC argues that a declaratory ruling by the Commission is necessary to resolve the conflict over the interconnection rights of Sprint and MCI in connection with their provision of service to VoIP providers. It is telling that the very parties directly affected by the orders, Sprint and MCI, have not requested Commission action. In fact, Sprint's actions in the Nebraska court flatly contradict the notion that Commission action is necessary. There, the Nebraska Commission's decision, (relied upon by TWC) has been appealed by Sprint.[17] Thus, the Nebraska order is already being examined. And, it is particularly noteworthy that Sprint has opposed a request to stay the court's briefing schedule pending Commission action in this proceeding. Surely, Sprint would not engage federal judicial machinery lightly were the necessity of a Commission ruling so manifest.

Further, because arbitration decisions are based on the specific facts and arguments presented to the state commission by the parties, it is doubtful that the rulings requested by TWC would be of value in future state commission proceedings in which the arguments and facts to be presented cannot be known.[18] More likely, a Commission ruling would stifle state commission fact finding efforts sorely needed to plumb TWC's

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[17] *Sprint Communications Company L.P. v. Nebraska Public Service Commission, et al.*, Case No. 4:05CV3260.

[18] Sprint, evidently, shares this view. In its filing before the Texas Commission, Sprint argues that the Commission should not rely on the South Carolina decision because "the South Carolina decision involved MCI and rural LECs in South Carolina and was limited to the facts and legal arguments presented in that proceeding." TWC Petition, Exhibit 9 at 2.

relationship with Sprint and MCI. In sum, contrary to TWC's claims, Commission action is not necessary.

V. The Commission cannot Rule in this Proceeding that Sprint and MCI are Telecommunications Carriers

Taken as a whole, it could be concluded that the purpose of TWC's Petition is to prevent incumbent LECs from raising, and state commissions from considering, lawful objections to requests for interconnection and the various obligations imposed by Section 251(b) of the Act. The Rural Commenters reach this conclusion because, although the Petition is styled as a request for declaratory ruling on Section 251, TWC devotes seven out of eleven pages of argument attempting to prove that Sprint and MCI are telecommunications carriers in connection with their arrangement with TWC.

The information presented by TWC, however, actually raises questions as to the true nature of the relationship between Sprint and MCI and TWC. According to TWC, "[c]ontrary to some state commissions' claims that Sprint and MCI have somehow failed to demonstrate their common carrier status, those companies have consistently made clear that they offer wholesale interconnection services not only to Time Warner Cable, but to any cable operator or other similarly situated customer."[19] Whether an entity is operating as a telecommunications carrier and, thus, a common carrier, is a factual question that can be answered only by examining the facts in connection with the specific arrangement. As the Commission and courts have found, an entity can be a common

[19] TWC Petition at 16.

carrier for some purposes and not others.[20] Therefore, the mere fact that Sprint and MCI may have a CLEC certificate of authority does not settle whether Sprint and MCI are, in fact, operating as telecommunications carriers *vis-à-vis* TWC in that particular state.

Likewise, the numerous statements in TWC's Petition and in the various state commission proceedings concerning the services provided by Sprint and MCI, and their relationship to TWC, do not settle the question of whether they are acting as telecommunications carriers. Indeed, as earlier noted, some of the statements are contradictory. For example, as discussed, TWC refers to Sprint and MCI as acting "on behalf of" TWC, whereas Sprint and MCI claim to be acting on their own behalf. Also, TWC states that, through its arrangement with Sprint and MCI, it receives calls from and delivers calls to subscribers connected to the PSTN[21] and that Sprint and MCI assist TWC in providing various services.[22] Sprint states in its filing before the Texas Commission, however, that it will provide various services to TWC.[23]

The distinctions in these descriptions are not minor. They go to the heart of whether Sprint and MCI are offering a separate telecommunications service to TWC, or whether Sprint and MCI are simply selling "piece parts" to TWC for TWC to complete its own service. There is nothing that precludes Sprint and MCI from leasing switch capacity to TWC. And, entities other than common carriers or telecommunications carriers can do many of the tasks that Sprint claims to perform, like number assignment and administration functions, number porting, 911 circuit provisioning, 911 database

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[20] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).
[21] TWC Petition at 4.
[22] TWC Petition at 4.
[23] *Id.* at 4 (emphasis added).

administration, and 911 contract negotiation. Thus, none of these things necessarily makes Sprint or MCI a telecommunications carrier in connection with its arrangement with TWC. On the other hand, it appears that TWC believes it is the originating and terminating service provider when it states that it receives calls from and delivers calls to subscribers connected to the PSTN and that Sprint and MCI "assist" TWC in providing various services.

TWC also alleges that Sprint and MCI hold themselves out indifferently to provide service. While Sprint and MCI argue the same in the state proceedings, it appears that their "holding out" is to one or only a few customers. For example, in the Texas proceeding, Sprint states that service will be offered indifferently "to all within the class of users consisting of cable companies and other entities who desire the services and who have comparable 'last mile' facilities to the cable companies."[24] Since Sprint contends that TWC is simply its customer, it is not clear why this restriction is appropriate. Could it be that the purpose of the restriction is to effectively preclude any other customer from subscribing to the services offered to TWC? In *AT&T Submarine Systems*, this Commission found that AT&T was not offering its service to the general public (and, hence, was not a common carrier), because its offering was to "a significantly restricted class of users, including common carrier cable consortia, common carriers, and large businesses."[25]

State commissions should be allowed to examine the facts presented in an arbitration proceeding necessary to determine if such a narrowly drawn "common

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[24] TWC Petition, Exhibit 9 at 4 (emphasis added).
[25] *AT&T Submarine Systems, Inc.*, 11 FCC Rcd 14885, 14892 (1996) (subsequent history excluded) (*AT&T Submarine Systems*).

carrier" offering is just that, or simply a sham to confer common carrier benefits where none exist. The Commission should deny TWC's attempt, through the declaratory ruling process, to prejudge this factual question and to preempt state commissions on this issue.

VI. The State Commission Decisions do not Preclude TWC's Arrangement with Sprint and MCI

Finally, TWC alleges that "state commissions that have prevented Time Warner Cable from utilizing wholesale telecommunications services obtained from competitive carriers such as Sprint and MCI have violated the Act, Commission precedent, case law, and the public interest in promoting competition."[26] TWC's premise, however, is incorrect because the state commissions have not prevented TWC from utilizing wholesale services obtained from Sprint and MCI. Rather, the state commissions have addressed whether and to what extent Sprint and MCI are entitled to the various benefits contained in Section 251(a) and (b) of the Act in connection with their arrangement with TWC.

[26] TWC Petition at 22.

VII. Conclusion

Based on the foregoing, the Rural Commenters urge the Commission to deny TWC's Petition.

Respectfully submitted,

SOUTH DAKOTA TELECOMMUNICATIONS ASSOCIATION

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Dated: April 10, 2006